

*Chuck*  
*(By F&S)*

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\*\*\*\*\*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT )  
76M 112876 BY MARLEN G. SAVIK )

FINAL ORDER

\*\*\*\*\*

The Proposal for Decision (Proposal) recommending granting Beneficial Water Use Permit 76M-112876 to Applicant Marlin Savik to appropriate 40 gpm up to 14.63 acre-feet of water per year from a groundwater well at a point in tract 5B2, of Elk Watch Estates, in the NW1/4SW1/4NW1/4 of Section 36, Township 15 North, Range 21 West, Missoula County, Montana was entered on June 28, 2001. Objector Lawrence and Vivian Exe and Objector Gilbert Richards filed timely exceptions to which Applicant has responded.

Objector Exe argues that Applicant has not established water availability or that other wells will not be adversely affected. For this review, the Department must accept the Hearing Examiner's Findings of Fact if they are supported by substantial evidence in the record. Mont. Code Ann. § 2-4-622(3).

The Hearing Examiner found that water is physically and legally available in Findings of Fact Nos. 4 and 5 of the Proposal and that the rights of prior appropriators would not be adversely affected in Finding of Fact No. 6. Those findings appear to be more than adequately supported by pump test data and expert testimony on basin yield and aquifer characteristics as stated in the discussion accompanying those findings. Of greatest significance to Objector Exe, the evidence indicates that their well might experience a drop of approximately ¼ inch when Applicant is pumping. The Hearing Examiner found, and the Department agrees, that Objector Exe will be able to reasonably exercise their water right under such conditions.

Objector Richards requested that Applicant be required to monitor and maintain a record of water use. The Department may condition a permit where necessary to establish the criteria in Mont. Code Ann. § 85-2-311. Here Applicant has already established the 311 criteria so requiring water use measurement is not necessary. The Department therefore lacks authority to

**CASE # 112876**

require water measurement. Moreover, monitoring Applicant's water use, without similar monitoring of all other water users and wells in the basin would provide little useful information concerning the area's hydrogeology.

The Department generally supports water use monitoring by all water users and believes that any individual water user can benefit and protect their water right by monitoring their own water use. Applicant has indicated that he would not object to monitoring his water use from power consumption records. The Department encourages the Applicant to maintain such records but will not require it.

If the Objectors continue to have concerns that the aquifer in the area cannot support additional development, the solution might be found in Mont. Code Ann. § 85-2-506 & 507 which provides for the creation of controlled ground water area where ground water withdrawals are in excess of recharge or ground water levels are declining. It is up to the water users of the area to petition the Department and present the evidence for establishing a controlled ground water area.

The Department having given the Objectors' Exceptions due consideration adopts the Findings of Fact and Conclusions of Law already presented in the Proposal for Decision. The Department makes the following:

#### **ORDER**

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76M-112876 is **ISSUED** to Marlen G. Savik to appropriate 40 gpm up to 14.63 acre-feet of water per year from a ground water well at a point in tract 5B2, of Elk Watch Estates, in the NW¼SW¼NW¼ of Section 36, Township 15 North, Range 21 West, Missoula County, Montana. The means of diversion is a well. The multiple domestic period of use is January 1 to December 31; the lawn and garden period of use is April 1 to September 30, both inclusive, of each year. The volume and purpose is 9.0 acre-feet for multiple domestic, and 5.63 acre-feet for lawn and garden. The nine domestic places of use are in Lots 1-9 of Elk Watch Estates subdivision; Lots 1 and 2 in the SW¼SW¼NW¼, Lots 3, 4, 5, and 6 in the SE¼SW¼NW¼, and Lots 7, 8, and 9 in the SW¼SE¼NW¼, all in Section 36, Township 15 North, Range 21 West, Missoula County, Montana. The place of use for the lawn and garden

**CASE # 112876**

purpose is .5 acres in Lots 1-2, 1.0 acres in Lots 3-6, and .75 acres in Lots 7-9 of Elk Watch Estates subdivision in Section 36, Township 15 North, Range 21 West, Missoula County, Montana. An 8,000 gallon storage tank will be located in the SW¼SE¼NW¼, Section 36, Township 15 North, Range 21 West, Missoula County, Montana.

**NOTICE**

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this 31<sup>ST</sup> day of July, 2001.



Jack Stults  
Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

**CASE #** 112876

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 2nd day of August, 2001.

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406-444-6615

**CASE #** 112876

Chuck

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION       )  
FOR BENEFICIAL WATER USE PERMIT       )       PROPOSAL FOR DECISION  
76M 112876 BY MARLEN G. SAVIK       )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307 (2001), a hearing was held on June 13, 2001, in Missoula, Montana, to determine whether a beneficial water use permit should be issued to the Applicant for the above application under the criteria set forth in Mont. Code Ann. §85-2-311 (2001).

APPEARANCES

Applicant appeared at the hearing by and through counsel, David L. Pengelly. Howard C. Newman, Hydrogeologist, testified as an expert witness for the Applicant.

Objectors Lawrence L. and Vivian M. Exe appeared at the hearing in person. Lawrence Exe testified for Objectors Exe.

Objector Gilbert Richards appeared at the hearing by and through counsel, Thomas C. Orr. Gilbert Richards and E. Karl Uhlig, Land and Water Consulting, Inc., testified for Objector Richards.

EXHIBITS

Both Applicant and Objector Richards offered exhibits for the record.

Applicant offered two exhibits for the record. The Hearing Examiner accepted Applicant's Exhibits 1-2.

**Applicant's Exhibit 1** is Howard Newman's vita consisting of four pages.

**Applicant's Exhibit 2** consists of a twenty-four page document sent to Jeff Pearson of Eli & Associates, Inc..

Objector Richards offered 2 exhibit for the record. The Hearing Examiner accepted Objector's Exhibits 1-2.

**CASE # 112876**

**Objector's Exhibit 1** consists of a three page list of Mill Creek area groundwater water right information followed by thirty-five pages of supporting documents for the information contained in the list.

**Objector's Exhibit 2** is two plat maps, taped together, of the Mill Creek area showing Objectors', Applicant's, and other area well locations.

#### PRELIMINARY MATTERS

At a prehearing conference the Parties stipulated that the issues for this hearing are limited to those of water availability and adverse affect.

At the hearing Applicant amended the application by removing the use of the two existing homes from the application well. The existing rights for the removed homes will be changed or replaced when the replacement well is drilled. The additional effect of the amendment is the flow rate increase for the existing rights (from 20 gallons per minute [gpm] to the new pumping rate of 40 gpm) is not needed.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

#### FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 76M-112876 in the name of and signed by Marlen G. Savik was filed with the Department on November 28, 2000. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate 40 gpm up to 14.63 acre-feet of water per year from a groundwater well at a point in tract 5B2 in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 36, Township 15 North, Range 21 West, Missoula County, Montana. The proposed means of diversion is a well. The proposed multiple domestic period of appropriation is January 1 to December 31; the proposed lawn and garden period of appropriation is April 1 to September 30, both inclusive, of each year. The proposed use is 9.0 acre-feet for multiple domestic, and 5.63 acre-feet for lawn and garden. The proposed nine domestic places of use are Lots 1-

9 of Elk Watch Estates subdivision; Lots 1 and 2 in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , Lots 3, 4, 5, and 6 in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , and Lots 7, 8, and 9 in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ , all in Section 36, Township 15 North, Range 21 West, Missoula County, Montana. The proposed place of use for the lawn and garden use is .5 acres in Lots 1-2, 1.0 acres in Lots 3-6, and .75 acres in Lots 7-9 of Elk Watch Estates subdivision in Section 36, Township 15 North, Range 21 West, Missoula County, Montana. An 8,000 gallon storage tank will be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ , Section 36, Township 15 North, Range 21 West, Missoula County, Montana.

(Department file, Applicant testimony)

4. Applicant has proven water is physically available. Applicant conducted an aquifer test to determine the aquifer's hydraulic properties by pumping his well at 50 gpm for 9.2 hours. Drawdown and recovery data were collected in the pumped well and nearby wells. Analysis of the test pumping data by Applicant's expert shows water at the proposed rate and volume is available. Applicant's expert estimated total basin yield at 15,191 acre-feet per year, of which 2.14 acre-feet is estimated to flow through the aquifer each day. Applicant's maximum daily volume needs are .08 acre-feet (27,123 gallons per day, which includes water for the two existing domestic uses removed during the hearing). Mr. Newman's testimony is well grounded by his background, experience, and use of published articles and information. (Department file, testimony of Howard Newman)

5. Applicant has proven water is legally available. Applicant's pump test analysis shows 479 gpm flow through the aquifer (groundwater flux) during the October period when the aquifer flows are declining.

Water use from the aquifer is also declining during this period. Conversely, during summer periods when aquifer use increases, the groundwater flow through the aquifer also increases, and the aquifer water levels are not decreased. A tabulation of groundwater rights in the area suggests the total flow rate for groundwater use in the area exceeds what is flowing through the system. However, not all of the tabulated rights draw water from the aquifer the Applicant uses, or they are located beyond the area of impact of Applicant's well. Some existing rights withdraw water at the rate less than their water



right. It is unlikely that all rights will be exercised at the same time, so water flowing through the aquifer will exceed the groundwater flux. In addition, the aquifer storage is available to handle short periods should the aquifer pumping demand exceed the groundwater flux in the aquifer. The aquifer will recover when aquifer pumping rate exceeds the groundwater flux for short periods. (Department file, testimony of Howard Newman, Karl Uhlig, Gilbert Richards)

6. Applicant has proven there would be no adverse effect to the water rights of prior appropriators under an existing water right, certificate, permit, or state water reservation. Objectors Exe and Richards voiced concern that the additional demand on the aquifer by the Applicant would drop the water level below their pump intakes or otherwise make water unavailable for use in their wells. The Objectors' wells were both drilled in the early 1970's and are both located on the fringe of the aquifer upgradient of the Applicant. In August 1994 both Objector Exe's and Objector Richards' pumps stopped providing water. They lowered their pumps to the very bottom of their wells and have had water since that time. The Objectors' wells fully penetrate the aquifer; thus, deepening the wells will not expose them to more water from the aquifer. Objectors' 1994 problems result from climatic conditions and their location on the fringe of the aquifer near a no flow boundary. Shutting down Applicant's pump when conditions are similar to those of August 1994 would raise the level of water in Objectors' wells approximately 0.01-0.02 feet (~ $\frac{1}{4}$  inch). Objector Richards has monitored static water levels in his well and found them to vary. At hearing, Objector Richards' static water level data was excluded because it was not timely disclosed. Even if the information were included, my ruling would not have changed. Variation is normal and typical in aquifers of this nature. Objectors Exe and Richards did not state why they could not reasonably exercise their rights under the changed conditions, and have not met their burden of production. The Hearings Examiner does not believe the aquifer should effectively be closed because of the relatively small effect Applicant's use will have. Objectors Exe and Richards will be able to reasonably exercise their rights under a 0.01-0.02 feet (~ $\frac{1}{4}$



inch) lower water level in their wells. (Department file, testimony of Howard Newman, Gilbert Richards, Larry Exe)

7. Applicant has proven the proposed means of diversion, construction, and operation of the appropriation works are adequate. The system has been designed under the guidance of a licensed engineer. (Department file, Applicant testimony)

8. Applicant has proven the proposed use of water for multiple domestic, and lawn and garden irrigation is beneficial. The amount requested is reasonable for nine domestic uses and 2.25 acres of lawn and garden irrigation. (Department file)

9. Applicant has proven he has possessory interest in the property where the water is to be put to beneficial use. (Department file, Applicant testimony)

10. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 (2001).

2. Applicant has met the criteria for issuance of a beneficial water use permit. See Findings of Fact 4 through 10. Mont. Code Ann. §85-2-311 (2001)

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

#### PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76M-112876 is **ISSUED** to Marlen G. Savik to appropriate 40 gpm up to 14.63 acre-feet of water per year from a groundwater well at a point in tract 5B2 in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 36, Township 15 North, Range 21 West, Missoula County, Montana. The means of diversion is a well. The multiple

domestic period of appropriation is January 1 to December 31; the lawn and garden period of appropriation is April 1 to September 30, both inclusive, of each year. The volume and purpose is 9.0 acre-feet for multiple domestic, and 5.63 acre-feet for lawn and garden. The nine domestic places of use are in Lots 1-9 of Elk Watch Estates subdivision; Lots 1 and 2 in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , Lots 3, 4, 5, and 6 in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , and Lots 7, 8, and 9 in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ , all in Section 36, Township 15 North, Range 21 West, Missoula County, Montana. The place of use for the lawn and garden purpose is .5 acres in Lots 1-2, 1.0 acres in Lots 3-6, and .75 acres in Lots 7-9 of Elk Watch Estates subdivision in Section 36, Township 15 North, Range 21 West, Missoula County, Montana. An 8,000 gallon storage tank will be located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ , Section 36, Township 15 North, Range 21 West, Missoula County, Montana.

#### NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 27<sup>th</sup> day of June, 2001.



Charles F Brasen  
Hearings Officer  
Water Resources Division  
Department of Natural Resources  
and Conservation  
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 28 day of June, 2001.

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